

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

10-CR-219-S

TONAWANDA COKE CORPORATION and
MARK L. KAMHOLZ

Defendants.

**GOVERNMENT’S CONSOLIDATED REPLY TO THE
DEFENDANTS’ RESPONSES TO THE SENTENCING MEMORANDUM**

THE UNITED STATES OF AMERICA, by and through its attorney, William J. Hochul, Jr., United States Attorney for the Western District of New York, and Robert G. Dreher, Acting Assistant Attorney General for the United States Department of Justice, Environment and Natural Resources Division, and the undersigned Assistant United States Attorney and Senior Trial Attorney, respectfully files this consolidated reply to the responses filed by Defendant Tonawanda Coke Corporation (“Tonawanda Coke”) (Dkt. #241) and Defendant Mark L. Kamholz (“Defendant Kamholz”) (Dkt. #242) (collectively hereinafter “Responses”) to the government’s sentencing memorandum. Many of the arguments now raised by the defendants have already been addressed in the previous submissions and exhibits filed by the government, and therefore, the government sees little value in replying on a point-by-point basis. However, the Responses raise certain issues that are addressed specifically below. Regrettably, the defendants’ pleadings fail to acknowledge full responsibility for their conduct, and ignore innocent community members of all ages who, having lived near Tonawanda Coke (i.e., the crime scene), continue to be haunted by

the defendants' actions to this day. In fact, because the defendants' pleadings in reality do little more than re-hash evidence and arguments already resolved by the jury in this case, the defendants' pleadings must in all respects be denied.

I. The HAP Emission Inventory is Completely Unreliable

The defendants continue to advance the argument rejected by the jury that the Hazardous Air Pollutant ("HAP") Emission Inventory provided by the defendants to the New York State Department of Environmental Conservation ("NYS-DEC") in July of 2003 provided notice of the defendants' use of the illegal bleeder valve. *See* Dkt. #241, pp. 4-5; and #242, pp.6-7. The defendants further take issue with the government's identification of a second bleeder valve (or pressure relief valve ("PRV")) known as the water seal bleeder valve that operated in the same manner, just at a higher pressure setting, than the by-products bleeder valve. However, the purpose of the government's identification of the water seal bleeder valve was to highlight the complete unreliability of the HAP Inventory. In that document, attached to the government's sentencing memorandum as Exhibit 3, there is a section on page 7-1 entitled "Boiler Emissions." Nowhere in that section is there any reference to the fact that coke oven gas was being emitted directly to the atmosphere through the water seal bleeder valve, which was connected to the coke oven gas system.

The defendants' continued reliance on the HAP Inventory to justify their conduct, in light of the overwhelming evidence as to its unreliability, is deeply troubling. Several witnesses testified at trial that the HAP Inventory was not meant to replace the procedure put in place under Title V of the Clean Air Act ("CAA") to identify and permit all emission

sources. Likewise, Harish Patel with the Environmental Protection Agency (“EPA”) has submitted an affidavit to the Court outlining how even if the HAP Inventory had properly identified the by-products bleeder valve, that would not have been proper notice under Title V. Apparently, the defendants, in spite of the jury’s verdict, continue to think otherwise. If the defendants truly believe that the HAP Inventory did provide the proper notice to the NYS-DEC for its unpermitted emission sources, then their persistence in continuing to raise this defense, notwithstanding the fact that it was soundly and thoroughly rejected by the jury, demonstrates that the defendants continue to exhibit the same insolence which resulted in their convictions in the first place. Until and unless this Court imposes the substantial punishment requested by the government, the defendants will apparently remain undeterred in their belief that they did nothing wrong.¹

II. The Defendants Never Disclosed that the Contents of the Barrett Tanks were to be Placed on the Ground

Both defendants vigorously argue that they provided full notice to the regulatory agencies regarding their intent to recycle the contents of the Barrett Tanks on the coal field in June of 2009. *See* Dkt. #241, pp. 7-8; #242, pp. 33-34. However, a review of the testimony of NYS-DEC Inspector Corbett belies this argument. During direct examination, Inspector Corbett unambiguously stated that he was not informed that the contents of the Barrett Tanks were going to be mixed on the coal field. When questioned about his interaction with Defendant Kamholz regarding the Barrett Tanks, Inspector Corbett testified as follows:

¹ Such a strongly held belief could also warrant the imposition of an environmental monitor by the Court at sentencing.

[Piaggione]: And did Mr. Kamholz indicate what was -- what, if anything, was happening or being done to that area?

[Corbett]: He said that there wasn't much going on there right now, but that their plan was to -- to deal with -- with the waste inside these cut-down tanks.

[Piaggione]: Okay. Did he indicate how he was going to take care of the waste inside the tanks?

[Corbett]: He said that the company planned on recycling the material.

[Piaggione]: Did he indicate where they were going to recycle the material?

[Corbett]: Back into the coke ovens.

[Piaggione]: Did he say where the mixing of that material was going to occur?

[Corbett]: *No.*

See Testimony of Corbett, March 12, 2013, p. 129 (emphasis added). In Tonawanda Coke's response submission, a portion of Inspector Corbett's cross-examination by Attorney Linsin is referenced to support its argument, however, additions are made to the quoted testimony through the use of brackets that change the meaning of the true testimony. *See* Dkt. #241, p. 7, note 3. In this quoted portion, Tonawanda Coke adds in brackets that Corbett was testifying with respect to the Barrett Tanks. That was not the case. In the pages preceding the quoted portion by Tonawanda Coke, the discussion centered on the K087 waste at the plant. Inspector Corbett was being asked about this K087 waste, which was produced during the coking operations and deposited into the tar box, where it was then scooped up and brought to the coal fields for mixing. It is this practice regarding the K087 waste, not the Barrett Tanks, that Inspector Corbett was testifying about, and it is unfortunate that Tonawanda Coke has attempted improperly to alter a quotation to make their point. Attached hereto as **Exhibit 1** is a copy of pages 144 to 147 of the transcript of Inspector Corbett's testimony, which make clear that he was discussing his knowledge regarding the practice of spreading the K087 waste onto the coal field.

III. The Government's Ability to Pay Assessment

In its Response, Tonawanda Coke criticizes the ability to pay assessment conducted by the government's expert. Yet, that criticism comes amidst a complete refusal to share any shred of recent financial data with the government. On the flip side, Tonawanda Coke has presented an ability to pay assessment based on undisclosed data, and as such, there is no mechanism for the government to peer review such report. The government will happily have its expert re-examine his conclusions if full access to the financial records is provided, however, until such time, the government stands behind its ability to pay assessment as an accurate reflection of the financial sanction that should be imposed by the Court.

IV. The Defendants Ignored Basic Environmental Regulations in Emptying the Contents of the Railroad Tanker Car

In the government's sentencing memorandum, the defendants' conduct in emptying a foul-smelling unknown liquid from a railroad tanker car is discussed. *See* Dkt. #216, pp. 22-25. In attacking this discussion, both defendants argue that the unknown foul-smelling liquid was actually a by-product of earlier coking operations. *See* Dkt. #241, pp. 12-13; #242, pp. 19-20. In addition, the defendants incorrectly argue that the government believes this material was "used oil." The government is not implying that the material in the railroad tanker car was used oil. Instead, the government believes that based on the sampling that had been conducted on May 7, 2010. of this liquid and the analytical results, that the liquid was a hazardous waste with the toxicity characteristic for benzene. Importantly, at the time they removed it, the defendants did not know what this material was. It was the defendants' obligation fully to understand the chemical composition of this material and, depending on the analytical results, either to obtain any necessary approvals

from the regulatory agencies, such as a Beneficial Use Determination,² for its re-use in the operations or properly to dispose of the material as a solid or hazardous waste. Instead, the defendants operated according to their own rules, and simply burned the foul-smelling unknown liquid.

V. Defendant Kamholz Assaulted a Pennsylvania DEP Inspector and was Not Forthcoming with the Regulatory Agencies

There is no question that Defendant Kamholz assaulted Bill Dunagan, a former Pennsylvania Department of Environmental Protection (“DEP”) air quality inspector. On October 3, 2013, Mr. Dunagan was interviewed regarding his interactions with Defendant Kamholz while conducting inspections at the Erie Coke Corporation (“Erie Coke”). Attached hereto as **Exhibit 2** is a copy of the interview report for Mr. Dunagan. Mr. Dunagan vividly recalled a confrontation he had with Defendant Kamholz sometime in 2006 or 2007 during an inspection at Erie Coke (it was later determined that the inspection occurred on July 25, 2007), and provided the following information:

Dunagan related that the incident occurred while he was conducting a Method 9 inspection at Erie Coke and asking Kamholz several questions related to the operations at the plant. He told us that Kamholz became very upset and began to scream at Dunagan. He told us that Kamholz “got in my face.” Dunagan said Kamholz was shaking and was so close that when he was shouting at Dunagan, spittle from Kamholz was striking Dunagan in his face. Dunagan told us that Kamholz “chest bumped” him and then shoved him. Dunagan told us that as a result of the shove by Kamholz, he (Dunagan) lost his balance and stumbled. Dunagan said he pushed Kamholz back and that, in an exchange of words that followed, Kamholz claimed that he didn’t shove Dunagan, but that Dunagan stumbled over a piece of coke on the ground.

² A NYS-DEC fact sheet regarding Beneficial Use Determinations can be found at <http://www.dec.ny.gov/chemical/8821.html>, last accessed October 4, 2013.

Exhibit 2. In addition to discussing the confrontation that occurred, Mr. Dunagan described how he felt that Defendant Kamholz was not forthcoming with him, would only answer the specific questions asked of him, and would not volunteer information. Moreover, Mr. Dunagan noted that on at least 12 occasions while he was conducting offsite inspections of Erie Coke, an Erie Coke worker would follow him in a green car.

Following his interview, Mr. Dunagan forwarded two e-mails to the government which contained additional details regarding the confrontation, including the name of other DEP inspectors present at the time (a third e-mail was sent which did not contain any relevant information). Attached hereto as **Exhibit 3** are two e-mails received by the government from Mr. Dunagan, one of which indicates that Defendant Kamholz actually called a DEP official to apologize for his conduct towards Mr. Dunagan. Following receipt of these e-mails, criminal investigators interviewed Craig Evans, a DEP official identified by Mr. Dunagan as having been present during the confrontation. Mr. Evans recalled that Defendant Kamholz was angered with Mr. Dunagan, got into his personal space, and called Mr. Dunagan a “bird dog.” Attached hereto as **Exhibit 4** is a copy of the interview report for Mr. Evans.

Consistent with Mr. Dunagan’s impressions of Defendant Kamholz, EPA Inspector Martha Hamre testified during trial that when she asked questions of Defendant Kamholz, he only answered the question that was asked and did not volunteer information. During the testimony of NYS-DEC Inspector Al Carlacci, a similar theme regarding Defendant

Kamholz's interactions with regulatory staff was developed, and included the following testimony:

[Mango]: Describe your interaction with Defendant Kamholz during your meeting in his office.

[Carlacci]: Well, I presented the data, like I said, and, you know, basically we were there just to see if we can work together to figure something out to kind of take a look at the by-products plant, you know, together. Hopefully -- you know, hopefully with our input and Mark's, we can see if we can learn something about the facility, about that side of the plant, or -- or the battery to find -- to find reductions. That's all we were after. And, you know, I gave my little speal and Mark was -- is relatively quiet, you know, when I asked him, you know, can you think of anything that contributes to these sources. You know, he had nothing to add. So I asked that, you know, can we take a quick tour of the by-products plant. You know, we couldn't stay very long. We wanted to be -- so we took a tour. He gave us a -- we walked -- I think we may have drove towards the battery and parked in this area here and then walked down the alley between the coke ovens and the by-products area. And I was just basically asking questions about the different sources there to see if we can, you know, identify some benzene emissions.

[Mango]: Let's be very clear. You were -- you were telling him you were concerned about benzene?

[Carlacci]: Yes.

[Mango]: And when you asked him what you just said, do you have any ideas or any suggestions, how did he answer that question?

[Carlacci]: He did not have any -- any input. You know, there was no -- no information that I recall that he gave back. *It was a shrug of a shoulder or something like that.*

See Testimony of Carlacci, Feb. 28, 2013, Vol. II, pp. 275-76 (emphasis added). Inspector Carlacci also described his observations of the ammonia still at Tonawanda Coke and his concerns that the ammonia and cyanide coming out of this still were the causes of the odor complaints by the community. Inspector Carlacci testified regarding Defendant Kamholz's reactions to these concerns:

[Mango]: Before you go on, let me ask questions here. The ammonia still area that you talked about, you said you raised this concern with Defendant Kamholz?

[Carlacci]: Yes, I did.
[Mango]: How did he respond to you?
[Carlacci]: *No comment.*

See Testimony of Carlacci, Feb. 28, 2013, Vol. II, p. 281 (emphasis added). Finally, Inspector Carlacci described his interactions with Defendant Kamolz regarding the light oil scrubber.

[Mango]: You saw it. What was your concerns with the light oil scrubber?
[Carlacci]: My concerns were there were leaks there. I asked Mark, you know, on the -- on the exhauster, you do monitoring with a piece of equipment to determine if there is VOC leaks. It's a requirement of the one of the NESHAP regs. I asked if he ever used that piece of equipment on this side of the plant, the positive side, the by-products side of the plant to see if there was any leaks to aid us in finding sources that maybe we can eliminate.
[Mango]: And what --
[Carlacci]: And his answer was no.
[Mango]: He said he had never done detection?
[Carlacci]: Never done that. I asked him if he -- you know, the light oil scrubber, again, looking in -- in rough shape, I asked if he ever went to the top of this unit to see if it was perforated up on top of the tank. *He said, "No, and I'll never go up there."* So that was pretty much the end of our tour. We left.

See Testimony of Carlacci, Feb. 28, 2013, Vol. II, pp. 288-89 (emphasis added).³

The information presented above does not paint a portrait of an environmental manager who has worked cooperatively with environmental regulators in the past. Rather, the evidence before this Court is that Defendant Kamholz was not forthcoming with

³ During a subsequent inspection in 2010, a regulator did climb up to the top of the light oil scrubber and observed that the scrubber was leaking benzene into the atmosphere and that a wooden plug was in use. In fact, during the EPA and NYS-DEC inspections in 2010, substantial quantities of benzene were observed leaking from numerous facility components at Tonawanda Coke. Some of the results were documented in EPA's Order on Consent dated July 19, 2011, which is attached hereto as **Exhibit 5**. From this document, along with the NYS-DEC's Tonawanda Community Air Quality Study which linked elevated levels of benzene and formaldehyde in the air to the actions of the defendants, along with the Health Outcomes Review conducted by the New York State Department of Health which found that the incidence of certain cancers was elevated in Tonawanda, there can be no doubt that the defendants caused widespread environmental harm.

regulatory staff regarding environmental compliance issues, and at least on one occasion, verbally and physically assaulted a public employee.

CONCLUSION

For the foregoing reasons, and for the reasons previously set out in the government's sentencing submissions, this Court should impose substantial criminal penalties when sentencing Tonawanda Coke and Defendant Kamholz. Neither defendant has displayed any level of remorse for their criminal conduct. Rather, the defendants continue principally to blame the regulatory agencies for failing to detect their criminal conduct. Such arguments were categorically rejected by the jury and should be rejected by this Court.

DATED: Buffalo, New York, October 7, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2013, I electronically filed the foregoing GOVERNMENT'S CONSOLIDATED REPLY TO THE DEFENDANTS' RESPONSES TO THE SENTENCING MEMORANDUM with the Clerk of the District Court using its CM-ECF system, which would then electronically notify the following CM/ECF participants on this case:

Rodney O. Personius, Esq.

Gregory F. Linsin, Esq.

Jeanne M. Grasso, Esq.

Ariel S. Glasner, Esq.

John J. Molloy, Esq.

I further certify that I provided a copy of the foregoing via inter office mail to the following participant on this case:

United States Probation Department
Attn: Susan C. Murray, USPO

S/ AARON J. MANGO

AARON J. MANGO